

RESPONSE

JOHN SHATTUCK

John Barton first provoked me to take this issue seriously six years ago when he presented a paper entitled "The Impact of Intensified Nuclear Safeguards on Civil Liberties" at a conference sponsored by the Nuclear Regulatory Commission. I am more a disciple than a critic of the Barton approach, but he and I have both changed our thinking in a number of significant ways since that conference.

The essential point of John Barton's paper, as I understand it, is that nuclear power is threatening to civil liberties, but is not uniquely threatening to them. From this perspective, nuclear power is really one of a growing number of phenomena—some political, some economic, some technological—that give rise to arguments of overwhelming necessity, which justify fundamental and systemic changes in the way we look at civil liberties. This is not a typical civil liberties problem. This is not a question of whether there is a right to leaflet or a right to demonstrate or to say unpopular things, or any number of other issues with which the ACLU grapples every day. This is a question of systemic change in and approach toward civil liberties.

I think there are many examples of phenomena similar to nuclear power which have a major impact on civil liberties and which change the way we think about them. This is true, particularly in the national security area, particularly since 1945. Take the peacetime draft, for example, which constitutes, from a civil liberties perspective, involuntary servitude. Or take CIA secrecy, which is justified on overwhelming national security grounds and which sometimes results in prior restraints on publication of certain information. Recent cases handed down by the Supreme Court, such as *Snepp*¹ and *Marchetti*² involve major changes in the way we think about the first amendment in the context of national security issues. Another example is foreign intelligence gathering and the way in which it is justified on national security grounds. Its impact on individual rights, through warrantless wiretapping, or other kinds of lowering of investigative and probable cause standards, closely resembles in many respects the potential civil liberties impact of the nuclear power phenomenon. A final example, perhaps the most extreme one, is the wartime internment of the Japanese-Americans which the Supreme Court upheld in *Korematsu*.³ This event fundamentally altered for a number of years the way in which we thought about the rights of people in wartime and it still affects the way we think about these rights today.

1. *Snepp v. United States*, 444 U.S. 507 (1980).

2. *Marchetti v. United States*, 390 U.S. 39 (1968).

3. *Korematsu v. United States*, 323 U.S. 214 (1944).

Each of these examples is part of the larger phenomenon of the creation of what has been called the national security state. Such an apparatus substantially changes the reach of civil and constitutional rights in some areas involving what the government determines is national security. I agree with the analysis that puts nuclear power into that category. This analysis helps explain why certain arguments will be made to justify the lowering of civil liberties in the context of certain nuclear safeguards and reactions to nuclear emergency. But the question before this conference still remains: Is there something unique about nuclear power that makes it fundamentally more threatening to civil liberties in a systemic way than these other phenomena? In suggesting how we might answer this question, I would like to point out two basic differences between the nuclear issue and other systemic pressures on civil liberties. The first difference involves the question of the commercial development of nuclear power and the extent to which the necessity for violating civil liberties in the nuclear area is brought into the sector of commercial and private enterprise. In this respect nuclear private enterprise is like an intensified national defense industry. Where else in the private sector can national security arguments be used to justify extensive security systems? The nuclear industry can use national security arguments in various ways to justify actions which invade civil liberties. This may become a moot point if nuclear power in the commercial sector does not grow, as several participants in the conference have suggested it will not.

However, even if nuclear power does not continue to develop commercially, there will exist a second difference, a relatively unique one, which is ultimately more disturbing in terms of its civil liberties implications. It involves nuclear weapons. The nuclear weapons issue presents most starkly the uniqueness of the nuclear question and sets it apart from the issue of wiretapping or other kinds of national security activities which affect civil liberties. As several speakers have pointed out, nuclear weapons development will inevitably involve the production of plutonium. Plutonium is highly dangerous, and its production cycle is highly subject to terrorist or emergency incidents. Plutonium production is qualitatively different from the production of liquefied gas or other kinds of energy. These changes are supplemented by those of nuclear weapons production. When we get to the nuclear weapons field, and we look at the increasing proliferation of weapons technology, the growing threats of terrorism and the kinds of draconian security and secrecy programs that must be installed in order to protect the nuclear weapons production process, we do have a unique and dramatic impact on civil liberties which far transcends other national security pressures.

I would like to comment briefly on another aspect of John Barton's paper, because it also touches on the question of where serious incursions on civil liberties are going to occur: nuclear emergencies. Concern arises not so much with what is going to happen to deal with the emergency after it occurs but with the kind of preventive actions that will be taken to forestall the

emergency, particularly if it is a terrorist incident, from occurring in the first instance. The kinds of safeguards and security systems and surveillance systems that must be set up in order to avoid a nuclear disaster may have more long-term consequences for civil liberties than the actions that authorities take to deal with an emergency after it occurs. Something as mundane as a system of security clearances raises very serious questions when it applies to an entire sector of the economy. The system that has now been put into effect in the private industry, as I understand it, involves many of the same kinds of security clearance practices required for access to the most highly classified government information. Some of these clearance procedures are already used by defense contractors, but never on a scale as large as is now the case in the nuclear industry. Individuals are ineligible for employment if they advocated without subsequently rejecting totalitarian fascist or communist beliefs, if they are homosexual, or engage in other sexual "perversion," if they associate with any organization which advocates the overthrow of the government, or if they have immediate relatives living in "a nation whose interests may be inimical to those of the United States or in satellites or occupied territories thereof." Those who have worked in the security clearance field recognize these familiar categories. However, their application to an entire area of energy development, and particularly in the weapons development area, suggests that a much broader number and universe of people will be subject to the kinds of security clearance programs that raise civil liberties questions.

Obviously, the secrecy of information and the surveillance and infiltration of potential terrorists pose important issues. A whole range of questions emerges from the effort to avoid the emergency that John Barton talked about in his paper. So, we do have something that is different here. It is different from all of the other phenomena that affect civil liberties in the national security field.

The greatest long-term threat, which is brought out at the conclusion of the Barton paper, has to do less with any particular actions taken to safeguard nuclear materials or to deal with emergencies than with the long-term changes in public attitude about the way in which civil liberties and nuclear power interrelate. The public naturally wants safety, probably more than it wants civil liberties. The kind of Benthamite calculus that would be made might not necessarily tilt against the torturing of the person who may have information that would save 100,000 lives, and perhaps it should not. The point is that over the long term, the public could well find itself willing to accept major incursions on civil liberties in the interest of assuring adequate safety. That is why nuclear development—especially nuclear weapons development—may well present a unique and systemic threat to our liberty.

